

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 18A-0791E

IN THE MATTER OF THE VERIFIED APPLICATION OF BLACK HILLS COLORADO ELECTRIC, INC. FOR EXPEDITED APPROVAL OF ITS ECONOMIC DEVELOPMENT RATE TARIFF.

PROCEEDING NO. 19A-0055E

IN THE MATTER OF THE VERIFIED APPLICATION OF BLACK HILLS COLORADO ELECTRIC, LLC FOR EXPEDITED APPROVAL OF A SERVICE AGREEMENT PURSUANT TO ITS ECONOMIC DEVELOPMENT RATE TARIFF.

**STATEMENT OF POSITION OF
BLACK HILLS COLORADO ELECTRIC, LLC**

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I. INTRODUCTION

This case concerns Black Hills Colorado Electric LLC's, d/b/a Black Hills Energy ("Black Hills," "Company," or "BH"), proposals and efforts to facilitate new and needed economic development in Southern Colorado through the implementation of a new Economic Development Rate ("EDR") Tariff. Economic development is the number one priority of Mayor Gradisar of the City of Pueblo, Colorado.¹ Numerous public comments have been submitted in this consolidated proceeding supporting the need for economic development.² Black Hills agrees with the Mayor and the public commenters that bringing the benefits of economic development to the communities it serves is critically important.³ The EDR Tariff will permit Black Hills to take an active role in aggressively pursuing development opportunities on a national, state, and local front to facilitate much needed growth in Southern Colorado.⁴

The EDR Tariff is authorized by House Bill 18-1271 ("EDR Act"),⁵ which became effective on January 1, 2019. The EDR Act permits utilities to begin entering into negotiated economic development rate contracts with qualifying customers pursuant to Commission-approved tariffs. Black Hills' EDR Tariff is the first utility-proposed tariff under the EDR Act.

Consistent with the EDR Act and its EDR Tariff, Black Hills has entered into a negotiated Service Agreement with a new large data center customer named [REDACTED] ("Data Center Customer" or "Customer") to bring the benefits of its development to Pueblo.⁶

¹ 4/3 Tr. at 128:16-20.

² Ex. No. 108 at 12:8-13:13.

³ Ex. No. 104 at 4-5. Staff witness Ms. O'Neill testified that "The conditions in the City of Pueblo, my understanding, is that the economic growth rate, in the City of Pueblo, is below the average growth rate for the State of Colorado, as a whole; and that the unemployment rate, in the City of Pueblo, is also higher than it is for the state, as a whole. 4/3 Tr. at 140:10-15.

⁴ Ex. No. 104 at 4-5.

⁵ See Ex. No. 300 at Attachment RAF-2 (showing the EDR Act).

⁶ The Data Center Customer's name is protected as confidential at this time, and it is provided in Exhibit No. 108C at page 26, lines 6-7. Black Hills asserts it is appropriate to keep the Data Center Customer's name confidential,

The economic benefits associated with the customer's development are substantial. Black Hills quantified the direct benefits provided by the Data Center Customer's development to the community as \$25-\$40 million in just the first five years of the project.⁷ These benefits include new funding by the Data Center Customer to the Black Hills Energy Assistance Program in an amount to permit the Company to provide needed bill assistance to approximately 250 additional low-income families.⁸ Additionally, there will be new funding for the Company's Demand Side Management ("DSM") program in an amount that will lower the Company's current DSM Cost Adjustment ("DSMCA") by approximately 14% annually.⁹ Moreover, Black Hills proposes to provide a credit to standard service customers of 10% of the annual net income derived from serving the customer. No party has challenged these benefits,¹⁰ and none of these benefits will accrue if the Commission denies the Company's Service Agreement with the Customer.¹¹

II. THE EDR ACT

The EDR Act modifies the statutory provisions of the special contract statute, § 40-3-104.3, C.R.S., by adding new paragraphs (6)-(8). The new paragraphs permit utilities to enter into negotiated special rate contracts pursuant to Commission-approved tariffs¹² with customers that add at least 3 MWs of load at a single location.¹³ The contracts are not to exceed 10 years.¹⁴ The rates for service must be lower than the standard service tariff rate for the customer, as well as higher than the marginal cost to serve the customer.¹⁵

until such time as service starts to the customer. *See* Black Hills Colorado Electric, LLC's Response to Decision No. R19-0222-I, filed on March 14, 2019 in these consolidated proceedings.

⁷ Confidential Ex. No. 103C at 18:1-2 (providing Confidential Table MJH-1).

⁸ Ex. No. 107 at 34:10-14.

⁹ *Id.* at 34:15-35:2.

¹⁰ Ex. No. 108 at 7:18-8:7.

¹¹ *Id.* at 13:14-14:12.

¹² C.R.S. § 40-3-104.3(6).

¹³ *Id.* at § 40-3-104.3(7).

¹⁴ *Id.* at § 40-3-104.3(6).

¹⁵ *Id.*

This consolidated proceeding is the first proceeding involving the proper interpretation of the EDR Act. The interpretation of statutes in Colorado is well-established law:

This court's fundamental responsibility in construing a statute “is to ascertain and give effect to the purpose and intent of the General Assembly in enacting it.” “In so doing, we look to the plain and ordinary meaning of the statutory language, and we construe the statute to further the legislative intent represented by the statutory scheme.” We will read and consider the statutory scheme as a whole to give consistent, harmonious, and sensible effect to all its parts. “Where possible, we interpret conflicting statutes in a manner that harmonizes the statutes and gives meaning to other potentially conflicting statutes.” Where two legislative acts may be construed to avoid inconsistency, the court is obligated to construe them in that manner.

People v. Steen, 318 P.3d 487, 490 (Colo. 2014) (citations omitted).

i. Intent of the EDR Act

The intent of the EDR Act is to permit electric utilities to begin competing with utilities across the United States to attract and obtain new or expanded businesses with a successful economic development rate program, increasing employment and other economic development benefits in Colorado.¹⁶ The Commission should ensure that any recommendations it imposes on the Company’s EDR Tariff or the Service Agreement with the Data Center Customer comport with the intent of the Act.

ii. The EDR Act Creates a New and Separate Rate Offering

The EDR Act adds new paragraphs (6)-(8) to the special contract statute, § 40-3-104.3, C.R.S. The rules of statutory interpretation in Colorado demand that these new paragraphs (6)-(8) are interpreted as a separate process distinct and not controlled by existing paragraphs (1)-(2)

¹⁶ See Ex. No. 300 at Att. RAF-2 at 1-2 (providing the legislative declaration of the EDR Act). See also Ex. No. 107 at 9:4-9 (describing the Company’s interpretation of the intent of the EDR Act). In addition, the OCC finds that the primary thrust of the EDR Act is promoting economic development. 4/3 Tr. at 115:18-20.

of § 40-3-104.3, C.R.S. As explained by the Company¹⁷ and Staff,¹⁸ the conditions of the EDR Act in new paragraphs (6)-(8) are very different and inconsistent with existing paragraphs (1)-(2). To ensure the full intent of the EDR Act is effectuated and that no internal conflicts arise, the Commission must interpret the economic development rate tariff provisions of the EDR Act separate and apart from existing paragraphs (1)-(2) of § 40-3-104.3, C.R.S.

iii. “Marginal Cost” As Used In The EDR Act

The chief disagreement among parties to these consolidated proceedings is how to interpret the requirement in the EDR Act that a rate for service cannot be “lower than the utility’s marginal cost of providing service to the Qualifying Commercial or Industrial Customer.”¹⁹ The EDR Act does not provide a definition of “the utility marginal cost of providing service.” Moreover, the definition of “marginal cost” is important because the EDR Act permits utilities to forego Commission approval of contracts under their Commission-approved EDR Tariffs, so long as a customer’s load is less than or equal to 20 MWs.²⁰ To avoid the disagreements in this proceeding or forcing the Commission to provide a binding definition of marginal cost on an expedited basis, Black Hills will submit each negotiated contract under its EDR Tariff for Commission approval.²¹ This process will permit the Commission to decide whether the Company has properly designed a rate that is above marginal cost on a case-by-case basis, resolving all issues raised by parties as related to the definition of marginal cost.

Nonetheless, Black Hills also addresses another issue related to the interpretation of marginal cost raised by Staff, OCC, and Pueblo County—that a proper definition of this term

¹⁷ Black Hills addressed these issues in its Response to Decision No. R19-0213-I, submitted on March 4, 2019, in these consolidated proceedings.

¹⁸ Ex. No. 200 at 13:1-15:15.

¹⁹ C.R.S. § 40-3-104.3(6)(b)(I).

²⁰ See *id.* at § 40-3-104.3(6)(b)(II)(B).

²¹ Ex. No. 107 at 13:7-15:16.

requires some sort of an annual analysis of costs to determine how the marginal cost to serve a customer has changed during the life of a contract (*i.e.*, marginal cost assessments over the life of a contract).²² There are two reasons why the Commission should not adopt this recommendation as proposed by these parties.

First, there is no need for the Commission to adopt a blanket approach to define marginal cost at this time, as no party contests the Company's definition of marginal cost as applied to the only customer at issue—the Data Center Customer—which is explained below.²³ The Commission can address whether there should be some sort of annual analysis of marginal costs for future customers on a case-by-case basis.

Second, the plain language of the EDR Act provides that marginal costs are to be defined and examined once at a point in time, not throughout the life of a contract. Paragraph (6)(b)(I) of the EDR Act explains that the time to assess marginal costs is “**at the time the customer seeks to qualify for the economic development rate.**” The OCC witness Mr. Fernandez agrees that this provision “could be used as justification to use a specific point in time” to define marginal costs.²⁴ This interpretation makes sense because from a practicality standpoint there needs to be price certainty for the rate offered to the customer.²⁵ EDR Tariff customers need price certainty to justify their very large capital expenditure decisions.²⁶ Without price certainty in their rate, “it

²² See Ex. No. 107 at 40-43 (describing these different recommendations).

²³ Staff witness Ms. O'Neill and OCC witness Mr. Fernandez explained during cross-examination that Staff and OCC are now supportive of the Company's approach to defining marginal costs for the Data Center Customer. 4/3 Tr. at 117:19-119:21, 160-162.

²⁴ 4/3 Tr. at 121:11-22.

²⁵ 4/3 Tr. at 119:4-6 (Mr. Fernandez explained that “Just from a practicality standpoint, I think you need to look at [marginal costs] at a point in time.”).

²⁶ Ex. No. 108 at 18:4-6 (Mr. Crocker explaining the need for price certainty). See also Ex. No. 107 at 32:7-19 (Mr. Harrington explaining that “the Company cannot attract new customers and offer competitive rates for a fixed term if the Company will then be faced with the risk that in some future unknown proceeding, additional costs will be assigned to the EDR Tariff customer....This risk can be significant and is likely to prevent Black Hills and potential customers from being able to negotiate an acceptable rate.”).

will be nearly impossible for the Company to attract customers to the rate plan, denying the economic development benefits the EDR Act was intended to facilitate.”²⁷

In short, all issues concerning the definition of marginal costs have been resolved because: (1) no party contests the Company’s approach to marginal costs for the Data Center Customer; and (2) the Commission will be able to fully examine the marginal costs for future customers on a case-by-case basis. To the extent the Commission decides to make a blanket determination of marginal costs on a going forward basis in the Company’s EDR Tariff, the Company stresses that the EDR Act provides that marginal costs are to be defined and examined at a point in time, not throughout the life of a contract, which is necessary on a practical level for the Company to have a successful EDR Tariff program.

iv. Black Hills’ Requested Clarifications

Black Hills’ Verified Application explains that it seeks the following clarifications of provisions of the EDR Act: (1) so long as qualifying customers enter into agreements for service at a rate higher than the marginal cost of service to the customer, then Black Hills’ other utility customers are not engaging in any prohibited subsidization of economic development rates; and (2) this statute does not require Black Hills in subsequent rate reviews to fund the difference between actual revenues received from EDR Tariff customers and the cost of service for EDR Tariff customers.²⁸ Staff supports granting both of these clarifications.²⁹

Per the first clarification, it is supported by § 40-3-104.3(6)(c)(I), C.R.S., stating that other customers should not subsidize economic development rates offered to qualifying customers “consistent with subsection (6)(b)(I) of this section.” New subsection (6)(b)(I) states

²⁷ Ex. No. 107 at 42:9-11.

²⁸ Ex. No. 100 at 8-11.

²⁹ Ex. No. 200 at 6:9.

in turn that economic development rates may not be lower than the marginal cost of providing service to a customer. Accordingly, an economic development rate that is above the marginal cost of service to a customer will not lead to impermissible subsidization, as prohibited by the EDR Act.

Per the second clarification, it is supported by § 40-3-104.3(6)(c)(III), C.R.S., providing, with emphasis added, that “The Commission **shall not impute** to the utility revenues that would have been received from the qualifying commercial or industrial customer if the customer were being provided service under the corresponding rate for which it would have otherwise qualified under the utility’s tariffs.” This provision provides that the Commission in subsequent rate reviews will not require Black Hills to fund the difference between actual revenues received from EDR Tariff customers and the cost of service for EDR Tariff customers.

Denial of these clarifications is not only inconsistent with the plain language of the Act, but will also result in the Act having no separate purpose than the existing statutory provisions of § 40-3-104.3, C.R.S. (*i.e.*, paragraph (1)-(2)).³⁰ Such an inappropriate interpretation will defeat the legislative intent of the EDR Act, as it will fail to give meaning to the express provisions of the Act.³¹ The Commission must avoid such a result by granting Black Hills’ requested clarifications. If the Commission denies these clarifications, Black Hills will not be able to successfully grow the communities it serves, and it will be forced to abandon its EDR Tariff.³²

³⁰ Ex. No. 107 at 45:1-5.

³¹ *Johnston v. City Council*, 493 P.2d 651, 654 (Colo. 1972) (every word of a statute is to be given effect if possible); *City & County of Denver v. Taylor*, 292 P. 594, 596 (Colo. 1930) (same; not to presume legislature used language idly, with no intent that it be given meaning).

³² Ex. No. 107 at 45:6-46:4.

v. **Black Hills' Burden Under The EDR Act**

The EDR Act is specific on the burden that Black Hills carries. The Act provides in § 40-3-104.3(6)(c)(II), C.R.S. (emphasis added), that:

In a commission proceeding related to economic development rates authorized pursuant to subsection (6)(b) of this section, the utility bears the burden of proof to establish that:

(A) The rates or charges assessed to other customers do not subsidize the cost of providing economic development rates to qualifying commercial or industrial customers;

(B) The rates of other regulated utility operations do not increase; and

(C) Other customers on the utility's system do not experience a rate increase due to a rate or rates offered to a qualifying commercial or industrial customer pursuant to this section.

The Commission must make two determinations in this proceeding regarding this burden in the EDR Act. First, the Commission must decide whether Black Hills meets this burden as regards the Data Center Customer. The evidence in these proceedings provides that Black Hills has met this burden, as demonstrated by the support of virtually all parties (with some minor exceptions)³³ for Commission approval of the Service Agreement.

Second, the Commission must decide at what time Black Hills must meet this burden as described in the EDR Act. Section 40-3-104.3(6)(c)(II), C.R.S., expressly answers this timing question, as it states the burden on the utility concerning the rate offered applies in the Commission proceeding related to an EDR Tariff contract authorized pursuant to subsection (6)(b). The authorization discussed in subsection (6)(b) is a reference to the ability of a utility to enter into negotiated contracts under its Commission-approved EDR Tariff.³⁴ Black Hills proposes to seek Commission approval of all such contracts. The burden listed in the EDR

³³ See *infra* at Section IV.iii.

³⁴ See C.R.S. § 40-3-104.3(6)(b)(II)(B).

Act is thus applicable to Black Hills at the time it seeks Commission approval of an EDR Tariff contract. This burden process is similar to any other application Black Hills may submit to the Commission for approval.

Though this timing question of the applicable burden is not complex or different than any other application, certain parties have unfortunately overly confused this issue. For instance, Staff appears to argue that the burden listed in the EDR Act is intended to apply throughout the duration of an EDR Tariff contract, at rate cases, as well as to other Commission proceedings, such as Certificates of Public Convenience and Necessity, Electric Resource Plans, and Transmission Plans.³⁵ These arguments are wrong and directly inapposite to the express words of the EDR Act.

The EDR Act expressly provides that the Commission proceeding in which Black Hills carries its EDR Act burden is the proceeding where it seeks Commission approval of an EDR Tariff contract. In EDR Tariff contract proceedings, Black Hills will be seeking Commission approval that the rate offered is above the marginal cost to serve the customer, which itself is an issue that requires a determination once at a point in time (not over the life of a contract).³⁶ This complete interpretation of the applicable burden of the EDR Act is based on the express words of the EDR Act. In addition, this is the interpretation of the EDR Act that will provide needed certainty to Black Hills and EDR Tariff customers to facilitate the Act's intent.³⁷

³⁵ Ex. No. 200. Rev. 1 at 22:6-8, 31:19-34:22, 43:5-44:12, 50:5-11, and 77:5-13.

³⁶ See *supra* at Section II.iii.

³⁷ See *supra* at Section II.i.

III. EDR TARIFF

i. Company's Modified EDR Tariff Proposal

Proceeding No. 18A-0791 is the application for approval of the EDR Tariff.³⁸ The Company designed its EDR Tariff to comply with and implement the terms of the EDR Act.

Notable terms of the proposed EDR Tariff include:

- Meeting all statutory requirements of HB-1271, including the new/expanded customer load minimum of 3 MW; contracts will not extend beyond a term of 10 years; requiring a notarized customer affidavit that electric rates are a critical consideration/substantial factor for customer's location/expansion decision; and, disallowance of use of EDR Tariff for customers relocating from another Colorado public utility service territory;³⁹
- EDR Tariff customers are responsible for any customer-specific distribution or transmission investments in accordance with the Company's line extension tariffs;⁴⁰
- All riders and cost adjustments are applicable for service under the EDR Tariff, including the General Rate Schedule Adjustment ("GRSA"), Electric Cost Adjustment ("ECA"), Renewable Energy Standard Adjustment ("RESA"), Purchased Capacity Cost Adjustment ("PCCA"), Demand Side Management Cost Adjustment ("DSMCA"), Transmission Cost Adjustment ("TCA"), the Clean Air Clean Jobs Act Adjustment ("CACJA"), and Black Hills' Energy Assistance Program Fee ("BHEAP"), though a request could be made for specific waivers/variances of adjustments on a good cause basis;⁴¹
- Rates charged to customers other than those receiving service under the EDR Tariff will not subsidize the provision of economic development rates, through the offering of EDR rates for service that are at a minimum set at the marginal cost of serving the customer;⁴² and
- During any rate review, the Company will perform an analysis to demonstrate the net positive benefits associated with economic development rates provided to qualifying customers.⁴³ Black Hills will include in the rate review all cost and revenues

³⁸ See Ex. No. 102, Attachment MJH-1 (initial proposed EDR Tariff in direct testimony) and Ex. No. 107, Revised Attachment MJH-4 (modified proposed EDR Tariff).

³⁹ Ex. No. 102 at 14:17-15:18; 19:2-8.

⁴⁰ *Id.* at 18:1-5.

⁴¹ *Id.* at 18:7-18.

⁴² *Id.* at 19:10-15.

⁴³ *Id.* at 19:15-20:22; *see also* Attachment MJH-3 (calculating net benefits example).

associated with EDR Tariff customers in the Company cost of service calculations unless otherwise ordered by the Commission.⁴⁴

In Black Hills' initial EDR Tariff proposal, the Company divided the determination of marginal costs into two tranches. For customers with a load of less than or equal to 20 MW, the Company proposed a marginal cost of service based on the incremental cost to serve the new customer using the Company's existing infrastructure.⁴⁵ For customers with a load exceeding 20 MW, the Company did not propose any specific methodology in the EDR Tariff and instead proposed submitting each contract to the Commission—at which time it would seek approval of customer-specific marginal costs.⁴⁶

In its rebuttal case, the Company agreed to file all EDR contracts for the Commission's approval.⁴⁷ The revised EDR Tariff⁴⁸ deletes the Company's initial proposed marginal cost definition. The Company made this change because of differences of opinion among the parties as to how to define marginal cost in the EDR Tariff for all customers, and the short timeline of this consolidated proceeding.⁴⁹ This approach gives the Commission flexibility to determine what should be used to define the marginal cost of each customer based on the factual circumstances and characteristics of that customer and the impacts to the Company's system.⁵⁰ By adopting this approach, the Commission need not adopt any specific definition of general applicability of marginal cost as used in EDR Act at this time.⁵¹ After future contracts are filed

⁴⁴ Ex. No. 102 at 21:5-8; 4/2 Tr. at 112:2-20.

⁴⁵ Ex. No. 102 at 16:21-17:6. The Company proposed the marginal cost to be the Company's average variable cost of generation and purchased power expenses including variable production operations and maintenance expenses grossed up to reflect transmission line losses expressed in dollars per kilowatt hour. *Id.*

⁴⁶ *Id.* at 17:12-14.

⁴⁷ Ex. No. 107 at 13:7-20.

⁴⁸ *See* Ex. No. 107, Revised Attachment MJH-4.

⁴⁹ *See* Ex. No. 107 at 13:7-20.

⁵⁰ *Id.* at 15:6-8.

⁵¹ *Id.* at 13:7-20.

for approval, the Company expects a standard definition to develop, allowing for a future proposed tariff filing to adopt the standard definition that develops.⁵²

The Company will be asking on an *as needed* basis for expedited Commission approval of future EDR Tariff contracts to avoid a 210-day review period, similar to the Commission review procedures in the existing competitive statutory provisions in C.R.S § 40-3-104.3(1)(b).⁵³

ii. Party Recommendations

Virtually all the issues raised by the Parties are obviated by the Company's concession to file all EDR Tariff contracts for Commission approval. Staff agreed that each of the following issues may be decided on a case-by-case basis instead of deciding them in this proceeding:

- 1) How to manage contracts to address marginal costs that could adjust over the life of a contract;⁵⁴
- 2) The determination of net profit sharing for each EDR Tariff contract;⁵⁵
- 3) Reporting requirements for each EDR Tariff contract;⁵⁶
- 4) Whether an EDR Tariff customer should be functionally separated or "carved out" from standard service customers;⁵⁷
- 5) Whether an EDR Tariff customer should be subject to any specific rider, including the Energy Cost Adjustment;⁵⁸
- 6) Whether an EDR Tariff customer should have separate meters for incremental load expansion;⁵⁹

⁵² *Id.* at 15:10-13.

⁵³ *Id.* at 15:17-16:19.

⁵⁴ 4/3 Tr. at 169:19-170:14.

⁵⁵ *Id.* at 173:19-174:2 (Proposed EDR Tariff phrase, "Unless specified by the Commission in the specific economic development rate contract filing," allows Commission to manage impacts to and profit sharing with standard service customers).

⁵⁶ *Id.* at 175:19-176:1.

⁵⁷ *Id.* at 162:25-164:17.

⁵⁸ *Id.* at 164:18-165:4.

⁵⁹ *Id.* at 165:5-15.

- 7) Whether EDR Tariff customers should be allowed to move from an EDR Tariff contract directly to a statutory contract, under paragraphs 1 through 5 of C.R.S. § 4-3-104.3;⁶⁰ and
- 8) Whether the Commission should impose an aggregate cap of 40 MW for EDR Tariff customers who individually have a load need of less than 20 MW.⁶¹

It makes no sense to try to issue blanket rules at this early time to cover all future EDR Tariff applications, when each EDR customer will have differing characteristics.⁶² Staff's agreement that these issues may be addressed on a case-by-case basis should be applied to all of the Parties' recommendations regarding the EDR Tariff and future EDR contracts. That said, Black Hills briefly addresses below some of the issues raised by the Parties that will result in an unsuccessful EDR program if they are adopted by the Commission in this proceeding.

a. Customer Credit/Income Sharing Proposals

The Commission need not decide any customer sharing of net profit in this proceeding. Staff witness Ms. O'Neill, during cross examination, came to the same conclusion.⁶³ Customer sharing issues should be based largely on allocations of risk, as discussed below regarding the Data Service Customer. Staff proposed a blanket 10/90 (Company/standard service customers) sharing percentage for all EDR Tariff contracts. Such a blanket approach fails to acknowledge the efforts being made by Black Hills to attract customers and the potential risks that the Company will likely assume in many EDR Tariff contracts.⁶⁴ Staff supports 10/90 sharing based on similar sharing percentages associated with utility generation book ("GenBook") sales. However, GenBook sales using utility generation resources are not remotely comparable to EDR

⁶⁰ *Id.* at 165:16-166:3.

⁶¹ *Id.* at 166:4-166:15.

⁶² *See, e.g.*, Ex. No. 107 at 21:20-22:3; 23:17-24:3; 28:13-31:11.

⁶³ 4/3 Tr. at 173:19-174:2 (Proposed EDR Tariff phrase, "Unless specified by the Commission in the specific economic development rate contract filing," allows Commission to manage impacts to and profit sharing with standard service customers).

⁶⁴ Ex. No. 107 at 32:1-34:1.

Tariff contracts. There is very little risk, or potentially no risk, associated with utilities simply selling excess energy on the wholesale market using utility generation resources. In contrast, an EDR Tariff contract may involve significant risks that can impact the Company's economic standing, depending on how a contract is structured. Staff's blanket 10/90 sharing proposal lacks a foundational basis, and it fails to give the Company a proper incentive to aggressively procure new business activities to grow Southern Colorado.⁶⁵

Similarly, the Commission should reject Pueblo County's proposal that for each EDR contract standard service customers receive a credit in the "maximum" amount of \$6.60/MWh. The Commission need not make a blanket ruling on this sharing proposal in this proceeding, just as Staff agreed. That Pueblo County outside consultant Mr. Nalepa recommends a range for the credit illustrates that it is not possible to determine his proposed credit as a blanket rule.⁶⁶ If the Commission is to address this issue, it should reject Mr. Nalepa's proposed credit as baseless and fundamentally flawed for the numerous reasons expressed by Mr. Harrington.⁶⁷

b. EDR Separate Customer Class

Staff and Pueblo County's proposed EDR customer class is essentially the same issue, *i.e.*, whether all future EDR customers must be placed into a separate customer class to protect other customers. This recommendation is unnecessary, as Staff agreed that the separation or "carve-out" of EDR customers from standard service customers may be decided on a case-by-case basis.⁶⁸ Moreover, the Company has already proposed full tracking and transparency for

⁶⁵ See Ex. No. 108 at 19:17-20:7 (explaining the Company's need for a proper financial incentive to take on risks associated with running a successful EDR Tariff program).

⁶⁶ See Ex. No. 700 at 24:9-13.

⁶⁷ Ex. No. 107 at 35:3-37:2. Mr. Nalepa's comparison to the Cheyenne Light, Fuel, and Power Company's proposed Blockchain Interruptible Service Tariff is without foundation, as the \$2/MWh credit is based on the system costs of that Wyoming utility, which has no relationship to the Company, and does not consider the significant differences between the Blockchain Interruptible Service Tariff and the EDR Tariff. *Id.* at 35:8-18.

⁶⁸ 4/3 Tr. at 162:25-164:17.

EDR customers by fully detailing the capital investment costs associated with service to a customer.⁶⁹ In addition, it is entirely premature to decide in this proceeding how all future EDR customers, regardless of their marginal costs to serve, should be treated in a future rate review proceeding.⁷⁰ Not all EDR Tariff customers will have the same risks. Further, neither Staff nor Pueblo County provide information about how the Company could allocate costs between EDR Tariff customers, what the allocation factors would be, and whether the customer rates would be fixed or variable.⁷¹ The Commission should reject the unnecessary EDR proposal.

c. Reporting Requirements

Parties have raised numerous reporting recommendations. For instance, during the hearing, Staff recommended the following filings wherein Black Hills should demonstrate system impacts and costs associated with each EDR customer: (1) Electric Resource Plans;⁷² (2) Transmission Plans;⁷³ (3) Certificate of Public Convenience and Necessity applications;⁷⁴ (4) Rider adjustments (approximately 15 filings per year for rider adjustments);⁷⁵ (5) other potential applications;⁷⁶ and (6) an annual report.⁷⁷ In addition, Staff recommended vague reporting obligations in certain RESA compliance filings,⁷⁸ as well as new obligations in future rate cases. Concerning all of these filings, Staff clarified at hearing that the Company should not face a potential for cost disallowance, except for at rate reviews.⁷⁹

⁶⁹ Ex. No. 107 at 30:13-20.

⁷⁰ *Id.* at 29:4-11.

⁷¹ *Id.* at 30:3-31:7.

⁷² 4/3 Tr. at 176:10-19.

⁷³ *Id.* at 177:2-15.

⁷⁴ *Id.* at 177:16-178:18.

⁷⁵ *Id.* at 179:1-21; 180:18-181:8.

⁷⁶ *Id.* at 181:9-20.

⁷⁷ *Id.* at 185:5-9.

⁷⁸ 4/3 Tr. at 182:24-183:7.

⁷⁹ 4/3 Tr. at 195:10-196:3.

Black Hills' concern with these numerous reporting recommendations being imposed on fifteen-plus filings per year is that they are unnecessary, onerous, and burdensome.⁸⁰ For the only customer at issue—the Data Center Customer—Black Hills has proposed to file an annual Customer Credit report.⁸¹ During the hearing, Staff agreed that its annual report recommendation is “much the same thing” as the Company’s Customer Credit report.⁸² The Commission can address any further necessary reporting requirements related to future EDR Tariff customers on a case-by-case basis. In addition, the Company has concern that these recommendations will require Black Hills to perform a cost-of-service study in any or all of Staff’s recommended filings.⁸³ It is unduly burdensome to require Black Hills to perform an annual cost-of-service study to examine EDR Tariff customers, especially as there is only one such potential customer at this time.⁸⁴ The Commission should accept the Company’s Customer Credit report for the Data Center Customer, and examine the need for additional reporting requirements as it examines future EDR Tariff contracts.

d. Marginal Cost of Generation and Purchased Power Expenses

Black Hills proposes to determine marginal cost, including of energy, on a case-by-case basis. For this reason, the Commission need not decide at this time a blanket definition for how Black Hills should define the marginal cost of generation and purchase power expenses.

However, based on the hearing, it appears likely that WRA will recommend that all EDR customers should be assigned the highest cost of system generation under an unsupported

⁸⁰ Black Hills also has a major concern with any recommendation that these reporting requirements should prompt regular updates to the marginal cost rate offered to an EDR customer (*i.e.*, marginal cost updates for the life of a contract), as explained in Section II.iii.

⁸¹ Ex. No. 103 at 25:1-28:5.

⁸² 4/3 Tr. at 162:10-19.

⁸³ 4/2 Tr. at 193:11-194:2.

⁸⁴ Ex. No. 107 at 17:14-16 (“To the extent the Commission believes annual reporting requirements are necessary, the Company will comply, unless there are onerous requirements to conduct annual studies such as a CCOSS.”).

assumption that an EDR customer's energy costs will be higher than other customers. The Commission should reject such a recommendation as inaccurate, speculative, and unsupported. First and foremost, different EDR customers will have different amounts of load, load profiles, cost characteristics, as well as different EDR contract terms. The Data Service Customer, for example, will be served from off-system market energy, and thus will not add to energy costs or peak loading on the Black Hills system. Further, large commercial customers often have relatively flat load profiles, meaning they do not add any greater than normal load during peak load periods. Thus, there is no evidence in the record that would justify any such blanket recommendations across all EDR customers—which is why each EDR contract should be considered separately.

Second, WRA's questioning suggests that dispatching energy will necessarily result in start-up or higher energy costs, which is not true. For example, if a natural gas plant is already dispatched, but not at full capacity, adding one more MWh of production will decrease the marginal energy cost.⁸⁵ Thus, a recommendation that the Commission should assign the highest energy dispatch cost on future EDR Tariff customers would not be based on marginal cost, and it would simply place upward pressure on rates the Company can offer to EDR customers. This result would greatly limit the Company's ability to offer economical EDR tariff contracts.⁸⁶ Likewise, an arbitrary fixed increasing cost factor for EDR contracts would have no basis in actual marginal cost.⁸⁷

As noted above, the EDR Act does not define marginal cost. Mr. Egge testified that it will be complex and burdensome to attempt to identify at all times EDR customer energy cost at

⁸⁵ 4/3 Tr. at 53:6-23 and 55:22-56:7; *see also* Ex. No. 109 at 6:12-14.

⁸⁶ 4/3 Tr. at 54:5-15; *see also* Ex. 109 at 6:20-7:2.

⁸⁷ 4/3 Tr. at 100:21-101:1.

all times of every day because the costs are constantly changing.⁸⁸ The Commission should allow Black Hills to propose on a case-by-case basis the marginal cost of energy of each EDR customer in a practical, non-burdensome way consistent with the economic development purpose of the EDR Act.

e. Renewable Energy/RESA proposals

WRA makes alternative recommendations that, if an EDR contract is longer than three years, (1) the EDR customer be served with 100% renewable energy;⁸⁹ or (2) the EDR contract somehow “restrain” the customer’s peak load growth. WRA (and OCC) also make proposals regarding RESA payments. Black Hills opposes these suggestions.

WRA’s first proposal is inconsistent with the EDR Act. The EDR Act expressly allows that a contract be up to 10 years in length, and it does not provide that an EDR contract must be served with renewable energy. The primary intent of the EDR Act is to promote economic development, and the Commission should not add or subtract statutory words that contravene the legislature's obvious intent. *See People v. Cross*, 127 P.3d 71, 73 (Colo. 2006). Further, limiting the contract duration to three years introduces new risk to potential EDR Tariff customers, making it more difficult to attract customers to Southern Colorado.⁹⁰ Black Hills already has the incentive to ensure EDR contracts are as short as possible because, once the contract ends, EDR customers will shift over to standard tariff rates, which result in higher revenues.⁹¹

A 100% renewable energy requirement for EDR contracts greater than 3 years is also unreasonable. Mr. Egge testified that adding WRA’s proposal to the EDR Tariff will result in a

⁸⁸ 4/3 Tr. at 54:16-55:21.

⁸⁹ Ex. No. 800 at 23:8-16 (emphasis added). WRA appeared to back away from a 100% renewable requirement in its counsel’s questions at hearing, but the only evidence WRA submitted in this proceeding calls for the “total volume” of EDR customer energy use to be served by renewable energy.

⁹⁰ Ex. No. 107 at 26:13-16.

⁹¹ 4/2 Tr. at 188:20-189:6.

significant restriction of the Company's ability to offer economic development rates to new or existing customers, and to offer solutions to address individual customer needs.⁹² In addition to power supply cost, the Company must consider the EDR customer's supply needs, load shape, and reliability requirements, which may not be satisfied with a renewable requirement.⁹³

Per WRA's second proposal, WRA does not describe how to implement this proposal to restrain a customer's on-peak load growth. Any restriction on a customer's ability to grow their business or integrate electric supply interruptions into their business process during the term of the EDR contract reduces the value of the EDR Tariff to attract new customers and the new jobs, salaries, investments, and businesses that will benefit the community.⁹⁴

Turning to RESA, WRA (and OCC) also allege that the EDR customer may not be fully paying for its renewable energy standard ("RES") obligations through the RESA, and thus Black Hills should be subject to further payment for any shortfall. This position is unsupported by Colorado statute. The RES applies to qualifying utilities on a system-wide, not customer, basis. Utilities are required to generate, or cause to be generated, electricity from eligible energy resources in the amount of 30% of retail electricity sales by 2020. § 40-2-124(c)(I)(E), C.R.S. ("RES statute"). The RES requirement paid by customers is defined in statute as "two percent of the total electric bill annually for each customer." § 40-2-124(g)(1)(A), C.R.S.

As indicated above in *People v. Steen, supra*, statutes should be harmonized where possible. The EDR Act and the RES statute are easily harmonized by applying the plain language of the RES statute to EDR customers, *i.e.*, charging them 2% of their total annual bill for the RES. As required by statute, Black Hills charges its customers two percent of their total

⁹² Ex. No. 109 at 7:21-8:12.

⁹³ 4/3 Tr. at 58:6-17.

⁹⁴ Ex. No. 109 at 8:13-9:2.

bill, and will do so for EDR customers as well.⁹⁵ The Company also will comply with the RES requirement to serve 30% of its retail sales with renewable energy by 2020.⁹⁶ If the Colorado General Assembly wanted to apply a different RES standard or RESA regarding EDR customers, it could have done so, but it did not.

IV. SERVICE AGREEMENT FOR DATA CENTER CUSTOMER

As noted above, virtually all of the issues Parties raised about the EDR Tariff may be addressed on a case-by-case basis when each EDR contract is filed for Commission approval. A perfect example of one of those cases is the present application for approval of the Service Agreement with the Data Center Customer, which is Proceeding No. 19A-0055E. For service to this Customer, Black Hills structured an agreement and accompanying proposals so that Black Hills takes on a level of economic risk, existing customers are held harmless, and existing customers and the community benefit from substantial economic development. Due to Black Hills' approach, all Parties (with limited exceptions) have either removed their objections or indicated the Commission should approve the Service Agreement.

The Service Agreement with the Data Center Customer is strongly supported by, among others, the Pueblo Economic Development Corp ("PEDCO"), the International Brotherhood of Electrical Workers Local Union No. 667, the Catholic Charities of the Diocese of Pueblo, and the Senior Resource Development Agency.⁹⁷ Some of the Parties to this proceeding have questioned the longevity and bona fides of the Data Center Customer. Because of the confidential nature of data centers and what businesses and agencies they serve, there is admittedly some open questions about the Customer.⁹⁸ However, there is evidence that the Data

⁹⁵ Ex. No. 107 at 37:15-38:5.

⁹⁶ *Id.*

⁹⁷ *See* Ex. No. 108 at 12:8-13:13.

⁹⁸ *See, e.g.,* 4/2 Tr. at 270:7-23.

Center Customer has the intent and expertise to open its facility.⁹⁹ Notably, PEDCO is working with the Data Center Customer, and the Customer has entered into an agreement with PEDCO to purchase the real estate necessary for its data center, moving the project further along in its development phase.¹⁰⁰ An affidavit from the Data Center Customer, Confidential Exhibit VAC-1, indicates among other things a substantial capital contribution to the community, a large number of full time jobs and construction jobs, local hiring potential, and construction of a new facility that will have a 50 MW load.

Most importantly, the Company has isolated its standard service customers from the risks of the Service Agreement.¹⁰¹ While Black Hills cannot guaranty that all potential EDR customer opportunities will result in development (as such is the nature of new economic development), Black Hills has secured a reasonable agreement with the Data Center Customer that provides a realistic prospect for adding significant benefits to Southern Colorado. Because standard service customers are shielded from risks associated with the Data Center Customer, and Black Hills' customers will benefit from the Service Agreement and other economic benefits, the Commission should approve the Service Agreement.

i. Applicable Riders

The Service Agreement rate is inclusive of certain riders and fees, including the DSMCA, RESA, and BHEAP.¹⁰² For the reasons explained in Mr. Harrington's direct testimony, the GRSA, ECA, TCA, PCCA, and the CACJA are not applicable to the Data Center Customer, and

⁹⁹ Black Hills' team has worked with the Customer regarding its instant project and has worked with other data center customers in the past. 4/3 Tr. at 6:22-7:1. While not every data center customer is the same and it is difficult to make an exact assessment of a data center's business model and operations, the evidence demonstrates the Customer's full intent to open a data center in Pueblo. *See id.* at 7:11-18 and 4/2 Tr. at 243:10-17.

¹⁰⁰ Ex. No. 108 at 12:8-13:13 and 25:17-26:5.

¹⁰¹ 4/3 Tr. at 7:19-24.

¹⁰² Ex. No. 103 at 13:17-24.

there is good cause to grant a waiver from the EDR Tariff of these riders.¹⁰³ Staff agreed with these applicability determinations,¹⁰⁴ while OCC disagreed with the non-applicability of the CACJA to the Customer and proposed a new approach to the RESA rider.

OCC's position on the RESA rider is addressed above in the discussion regarding the EDR Tariff. Regarding CACJA, the OCC suggests that the CACJA rate rider should apply to the Data Center Customer. Black Hills disagrees because the Data Service Customer will not be served by Black Hills' system supply, including the renewables and LM6000.¹⁰⁵ OCC admits that that the only costs included in the CACJA rider are the capital costs related to the LM6000.¹⁰⁶ Because the LM6000 will not be dispatched to serve the Data Center Customer, the Customer should not have to pay for the LM6000's capital costs. No other party suggested that the CACJA apply to the Customer. OCC's position on the CACJA rider should be rejected.

ii. Standard Service Customer Risk Elimination

There are several provisions in the Company's proposal that ensure standard service customers do not face risk from providing service to the Data Center Customer. These include: (1) not dispatching the Company's existing generation portfolio to serve the Customer; (2) isolating from the Company's cost of service the new Customer from existing and future standard service customers; (3) providing the Customer an interruptible service; (4) ensuring that the Customer is responsible for the incremental direct investments necessary to serve them; and (5) procuring market energy to serve the Customer, so as not to impact the Company's ability to serve existing customers.¹⁰⁷ The Company is specifically proposing to isolate this new very

¹⁰³ *Id.* at 13:25–15:19.

¹⁰⁴ Ex. No. 200. Rev. 1 at 72:6-8.

¹⁰⁵ Ex. No. 103 at 15:16-19.

¹⁰⁶ 4/3 Tr. at 123:25-124:11.

¹⁰⁷ Ex. No. 103 at 20:14-21.

large Customer by separating the investments, expenses, and revenues associated with providing service to the Customer from the Company's cost of service.¹⁰⁸

Because the Data Center Customer will be separated from standard service customers, there are two primary sources of risk associated with serving the Customer: (1) investments in distribution and transmission resources necessary to serve the Customer, and (2) procuring off-system market energy to serve the Customer. These risks have been mitigated through the Service Agreement, and the remaining risk has been assumed by Black Hills to shield standard service customers.

a. Distribution and Transmission Investment

The distribution and transmission upgrades necessary to serve the Customer are detailed in Attachment DPK-1 to Exhibit No. 106, with a cost of approximately \$6.3 million (\$4.2 million for the distribution feeders and \$2.1 million for the transformer, switchgear, and other substation equipment inside Greenhorn Substation).¹⁰⁹ The Company will make these investments for the Customer. However, the Service Agreement provides several mitigation provisions to mitigate risk and shield other customers. First, there are two non-refundable security deposits that will be paid by the Data Center Customer [REDACTED]

[REDACTED].¹¹⁰ Second, the

Customer has agreed to a [REDACTED]¹¹¹ [REDACTED]

[REDACTED]

[REDACTED].¹¹² Third, as Mr. Kline detailed during his

¹⁰⁸ *Id.* at 21:2-6.

¹⁰⁹ Ex. No. 106 at 8:5-16.

¹¹⁰ Highly Confidential Ex. No. 106D at 8:18-25.

¹¹¹ *Id.* at 8:25-26.

¹¹² 4/3 HC Tr. at 84:23-85:1; 92:2-9.

testimony at the hearing, the distribution and transmission equipment listed in Attachment DPK-1 that will be purchased to serve the Customer—*e.g.*, overhead feeders, conductors, standard poles, switchgear, and transformers—is standard equipment that Black Hills uses and installs regularly throughout its territory.¹¹³ And fourth, the Service Agreement provides the ability to interrupt the Customer to relieve any potential strains on the capacity of the transmission system, which will help ensure that the Company will not have to make investments in the broader transmission system to serve the Customer and to not impact standard service customers.¹¹⁴

Mr. Kline also testified that he conducted staged transmission and distribution analyses such that he is confident no other upgrades are required to provide the required service to the Data Center Customer over 10 years.¹¹⁵ Even so, the Service Agreement contains a reopener after 5 years, thus any unexpected costs may be addressed in the second five year term.¹¹⁶

Thus, any risks concerning distribution and transmission investment to serve the Data Center Customer have been substantially mitigated.¹¹⁷ Any remaining risk is being shouldered by Black Hills, which fully protects all standard service customers from harm.

b. Power Supply Service to Customer

The other main risk in the Service Agreement is the power supply that Black Hills will procure to serve the Data Center Customer. This risk, too, is mitigated; though this is the main risk shouldered by the Company. Standard service customers face no such risk.

¹¹³ 4/3 HC Tr. at 92:17-93:22 (although this information was discussed during a highly confidential portion of the hearing, the specific information listed here is not confidential).

¹¹⁴ Ex. No. 106 at 10:20-26.

¹¹⁵ 4/3 Tr. at 99:6-100:20.

¹¹⁶ Ex. No. 106 at 10:6-14.

¹¹⁷ OCC's questioning of Black Hills' witnesses Mr. Crocker and Mr. Kline regarding a potential \$6 million or \$8 million risk amortized over the life of the contract were debunked as not remotely plausible by Mr. Kline. *See* 4/3 HC Tr. 94:10-15; 95:14-96:11.

Mr. Egge testified that the Data Center Customer [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].¹¹⁸ Black Hills intends to serve the Customer through the purchase of energy on the market on a long-term basis.¹¹⁹ Should Black Hills not have a long-term purchase to meet all of the Customer's needs, Black Hills will purchase day-ahead energy with the goal of minimizing the energy needing to be purchased in real-time.¹²⁰ The Company will evaluate wholesale market conditions to identify opportunities to purchase blocks of energy over longer periods.¹²¹

The Company's standard service customers are protected from any adverse impact from the energy supply purchases for the Data Center Customer. First, Black Hills' energy resources will not be dispatched to serve the Customer. Second, energy purchased to serve all other Company retail customers for the same timeframe during the same trading period will be ordered based upon price, prior to serving the energy needs of the Customer.¹²² Third, the Customer's energy costs will be kept separate from the Company's other retail customer costs by establishing a book to track and account for energy purchased for the Customer's load.¹²³ And fourth, the Service Agreement permits Black Hills to interrupt service to the Customer [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].¹²⁴

¹¹⁸ HC Ex. No. 105D at 5:6-21.

¹¹⁹ Ex. No. 105 at 5:22-6:15.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 7:18-24.

¹²³ *Id.* at 7:3-9 and 7:25-8:6.

¹²⁴ HC Ex. No. 105D at 8:7-14.

Mr. Kline and Mr. Harrington were questioned about a possible negative net margin to the Company under certain power supply purchase price scenarios. While Mr. Egge is confident there is a reasonable opportunity to obtain a market price that enables earning a margin from the fixed rate in the Service Agreement,¹²⁵ Black Hills and its shareholders will fund any additional expenses if Black Hills is unable to earn a margin under the Service Agreement.¹²⁶ This risk is mitigated by the Service Agreement provision that [REDACTED]

[REDACTED].¹²⁷ The Service Agreement also [REDACTED]

[REDACTED].¹²⁸ Further, the Service Agreement contains a reopener that allows negotiation of a different price for the second five-year term.¹²⁹

Notwithstanding these risk mitigation provisions, Black Hills acknowledges that it and its shareholders are taking on risk of a negative net margin if power supply prices increase to a certain level.¹³⁰ While standard service customers are shielded from harm and only receive benefit from the Service Agreement, Black Hills is taking on economic risk. This is why, as stated below, the Company's proposal for a 90/10 (Company/customers) sharing of net margin with the Data Center Customer should be approved.¹³¹

¹²⁵ Ex. No. 105 at 10:5-8.

¹²⁶ 4/3 Tr. at 37:8-12.

¹²⁷ HC Ex. No. 105D at 8:5-26.

¹²⁸ HC Ex. No. 105D at 10:3-16.

¹²⁹ HC Ex. No. 105D at 10:21-26 (the information discussed in the text above is not highly confidential).

¹³⁰ Ex. No. 105 at 11:1-12.

¹³¹ See Ex. No. 103 at 29:12-25.

iii. Parties' Proposals Regarding Service Agreement

Black Hills is pleased that virtually every Party in the proceeding now either support the Service Agreement or appear to have removed any objection to its approval, with some minor exceptions. The City of Pueblo generally supports it,¹³² as does Pueblo County.¹³³

Staff's position regarding the Service Agreement was stated at the hearing:

I think it is staff's general assessment that the provisions regarding this particular customer are also generally intended to ensure that that rate, the contract rate, is above marginal cost, consistent with the staff's position that that is the statutory requirement.

...[I]t is the company's expectation that that rate will -- would remain above marginal cost, for the five-year term of that contract; and that that information will be presented in an annual report, showing the positive net income associated with that contract, as it stays above marginal cost, over the five-year initial term of that contract.

And staff did not object to that calculation or that presentation. So, it is my understanding that what you are attesting to, is that your determinations, based on your experts, is that that contract rate will be above marginal costs for that five-year term. And staff is supportive of that, and the contract, under those expectations.¹³⁴

Staff continues to maintain that a 10/90 sharing of net margin is appropriate for the Data Center Customer, though Staff also states that the Commission should consider whether there could be a lower sharing percentage than its 10/90 recommendation if that is “the only thing that stood in the way” of effecting the Service Agreement.¹³⁵ On this point, Mr. Crocker testified that

¹³² See Ex. No. 500 Rev. 1 at 5:16-6:3 (“The City recommends that the Commission approve both applications and the EDR tariff, as it may be modified by the Commission based on the initiative of the Commissioners themselves or the recommendations of other parties in this proceeding. We also recommend that all risk factors to existing customers be avoided in the final decision in this consolidated proceeding”).

¹³³ See Ex. No. 700 Rev. 1 at 4:24-5:3 (“Because Black Hills proposes to shoulder all of the risk of the proposed EDR service agreement, Pueblo County generally supports it and takes no position on whether or not it is legally compliant”).

¹³⁴ 4/3 Tr. at 161:1-162:4 (emphasis added). Staff further stated that their view of their annual reporting recommendations and that stated by Mr. Harrington in his testimony are “much the same thing.” *Id.* at 162:10-15.

¹³⁵ *Id.* at 196:13-197:15.

Staff's proposed sharing would terminate the Service Agreement.¹³⁶ In addition, Staff's position on its recommended sharing percentage fails to acknowledge that:

- 1) Black Hills will not receive *any* net income from the Service Agreement unless it is able to procure energy for the Customer at prices that permit it to earn a margin, after subtracting from the rate for service in the Service Agreement facility costs and the operating expenses that Black Hills will incur to provide service;¹³⁷
- 2) Black Hills is not earning a return on any of the transmission, distribution, or power supply resources involved in serving the Data Center Customer; and
- 3) Staff's GenBook reference has no applicability to the Service Agreement, as no Black Hills generation resources are being used to supply the Customer.

Turning to the OCC, it recognizes that the Company is bearing "most" of the risk and thus supports the Company's proposed margin sharing because it provides potential tangible benefits to existing customers.¹³⁸ The 90/10 sharing proposed by Black Hills must be approved to balance the risk with a commensurate incentive.

The OCC recommends approval of the Service Agreement including the 90/10 margin sharing proposal, with some conditions that relate to marginal cost recovery.¹³⁹ Regarding marginal costs, as explained, OCC testified at hearing that the Commission could take the EDR statutory language into account to justify using a specific point in time to determine marginal cost, and, in fact "you need to look at it at a point in time.... So I would look for kind of certainty at a point in time and possibly revise it at a five-year period or whatever makes sense."¹⁴⁰ OCC then acknowledged that the Service Agreement has such a 5-year provision.¹⁴¹ It therefore

¹³⁶ Ex. No. 108 at 23:1-7.

¹³⁷ *Id.*

¹³⁸ Ex. No. 300 at 24:12-20 and 25:1-4.

¹³⁹ Ex. No. 300 at 6:1-16.

¹⁴⁰ 4/3 Tr. at 118:20-119:13 and 121:11-22.

¹⁴¹ 4/3 Tr. at 119:14-21.

appears OCC's positions on the Service Agreement have been addressed, with the exception of the CACJA rider and RESA rider, which were discussed above.

Lastly, we address WRA's position. WRA's recommendation that renewable energy be used for any EDR contract greater than 3 years is addressed above in the EDR Tariff section. The main issue regarding obtaining power supply for the Data Center Customer is timing, as the Customer will commence operations in 2019.¹⁴² Mr. Egge is not aware of any renewable energy projects that are online or within months of coming online that are uncommitted to other purchasers.¹⁴³ Further, in Mr. Egge's experience, the lead time to construct a new renewable resource is typically well over a year.¹⁴⁴ That said, the Company will explore the availability of renewable energy to serve the Data Center Customer, consistent with the Customer's needs.¹⁴⁵

WRA also questioned Mr. Egge regarding whether an RFP is contemplated for the market supply contract to serve the Data Center Customer. Mr. Egge explained that an RFP is not needed because Black Hills is working on a daily basis with counter-parties throughout the region that are likely going to be the suppliers of any energy for the Customer's load.¹⁴⁶ If the Company were to use an RFP, it would likely be bid into by the exact same companies that it speaks to already. There would be no purpose to ordering an RFP, and it could result in unnecessary and harmful delay in providing service to the Customer.

V. BLACK HILLS' REQUESTS FOR APPROVALS

i. EDR Tariff, Proceeding No. 18A-0791E:

1. Approve Black Hills' EDR Tariff, Revised Attachment MJH-4 of Ex. No. 107, on an expedited timeframe, and direct the Company to file, on not less than two business days' notice after issuance of a final order, the Tariff sheets in substantially identical

¹⁴² 4/3 Tr. at 56:17-57:7.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 58:1-21.

¹⁴⁶ 4/3 Tr. At 57:14-25.

form to the *pro forma* tariff sheets contained in Revised Attachment MJH-4 of Ex. No. 107, including:

- a. Allowing electric service at primary, secondary, or transmission level voltages;
 - b. At the Company's next rate review, Black Hills will include all cost and revenues associated with EDR Tariff customers in the Company's cost of service calculations, unless otherwise ordered by the Commission in an EDR Tariff contract filing; and
 - c. Company agrees that it will submit all EDR Tariff contracts for Commission approval, regardless of customer size (in MW), permitting a case-by-case analysis of marginal cost and other issues associated with the EDR contract.
2. Provide the requested legal clarifications of HB 18-1271, the EDR Act; and
 3. To the extent necessary or appropriate, grant such waivers, conditions, approvals or such other and further relief as it deems appropriate.

ii. **Data Center Customer Service Agreement, Proceeding No. 19A-0055E:**

1. Approve the Service Agreement on an expedited timeframe;
2. Approve differentiated treatment of the unique new Customer by carving it out of the Company's cost of service;
3. Approve the Company's Customer Credit sharing mechanism, which will share 10% of the net income with standard service customers by crediting the Energy Cost Adjustment ("ECA") for the new Customer over the life of the contract;
4. Approve the proposed modifications to the ECA tariff contained in Ex. No. 103, Attachment MJH-2, for the provision of the Customer Credit associated with this contract and direct the Company to file, on not less than two business days' notice after issuance of a final order, the Tariff sheets in substantially identical form to the *pro forma* tariff sheets contained in Ex. No. 103, Attachment MJH-2;
5. Specifically acknowledge that the Service Agreement entered into with the new Customer complies with the Company's EDR Tariff, Revised Attachment MJH-4 of Ex. No. 107;
6. Approve a variance/waiver of certain rate riders/adjustments (the GRSA, ECA, TCA, PCCA, and the CACJA) that should not be applicable to the new Customer; and
7. To the extent necessary or appropriate, grant such waivers, conditions, approvals or such other and further relief as it deems appropriate.

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